United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,011

MARION C. BROOKS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Raymond G. Larroca
800 World Center Building
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

September 11, 1967

STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a robbery prosecution, the trial court should have granted Appellant's motions for acquittal because the entirely circumstantial evidence against him failed to establish his participation in the crime?

2. Whether the judgment of conviction must be reversed because the jury was permitted to speculate on the question of guilt as an "aider and abettor" under D.C. Code §22-105, there being insufficient evidence to support a conviction under any "aiding and abetting" theory?

3. Whether the judgment must be reversed because the sum total effect of the trial court's charge was to leave the jury with contradictory instructions as to the quantum of proof necessary to support a conviction under D.C. Code 22-2901 (Robbery) - and with no instructions as to the quantum of proof necessary to support a conviction under D.C. Code §22-105 (aiding and abetting).

4. Where, immediately after the crime, the only eyewitness to the robbery (the victim) had identified as the robber another person in the same lineup as the Appellant, and where she could recollect almost nothing about the participants in that lineup, but immediately subsequent thereto conversed with police officers and was then able, at trial, to describe the robbers' clothing in such a way as to fit differing descriptions given at different times by the arresting officer - did the refusal of the trial court to permit cross-examination of the witness as to the content of the conversation with the police officers constitute reversible error?

5. Did the various mischaracterizations of the evidence by the prosecutor as to critical aspects of the Government's circumstantial case prejudice Appellant so as to require reversal?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of Title 22, Section 2901 of the District of Columbia Code (Robbery) Appellant was indicted on December 5, 1966. On his plea of not guilty, he was tried before a judge and jury in the District Court. He was found guilty, and sentenced to a term of 5 to 15 years on April 28, 1967. By order of the District Court dated April 28, 1967, Appellant was authorized to proceed on appeal in forma pauperis. Jurisdiction of this Court to review the judgment below rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

On the morning of November 8, 1966, Mrs. Florence Louise Steele was operating her dry cleaning establishment at 3933 Georgia Avenue, N.W. (Tr. 17). A man, never identified, entered the store wearing a long black coat, put his hand in his pocket, demanded the money in the cash register and pushed Mrs. Steele towards the back of the store (Tr. 20-21). A second man came in and asked Mrs. Steele where her pocketbook was. She told him, and both men left the store by the front door (Tr. 21-22), taking with them $16.75 from the cash register, and Mrs. Steele's billfold containing approximately $25.00 (Tr. 23). About $14.75 in change "was included in the total taken" (Tr. 24). The second man in the store, similarly never identified, according to Mrs. Steele was wearing a "short coat . . . maroon or tan" which definitely "wasn't an overcoat"(Tr. 27).

Mrs. Steele ran outside to a nearby barber shop, shouting that she had been robbed. Two men inside, one of them an off-duty rookie police officer on his first day of regular police duty (Tr. 35), came out and she pointed to the two men going south on Georgia Avenue (Tr. 32).

The police officer, Moses E. Brewington, testified that when he ran out of the barber shop, he saw two men turning a corner on Randolph Street (Tr. 37). According to Brewington, one was wearing a "long black coat" and the other a "light coat" (Tr. 50). He "believed" they had hats on but could "not remember that too well" (Tr. 59). Brewington and

the barber ran to the barber's car, drove to Randolph Street and then west on Randolph, until they observed two men walking down Tenth Street (Tr. 37) about three and a half blocks away from the scene of the crime (Tr. 48). Neither of these two men was wearing "big coats" or "outer garments" (Tr. 50-51). Nevertheless, Brewington, who around Tenth Street had pulled his gun (Tr. 45-46), got out of the car and identified himself as a police officer from about thirty feet away (Tr. 37). According to Brewington the two men then "took off" (Tr. 48). The officer chased these men onto Raymond School Playground, where they split up. Proceeding around a building, Brewington found the Appellant in some bushes near the building, and placed him under arrest. Brooks had a wallet, later identified as Mrs. Steele's in his right rear pocket, some bills and some change in the total amount of $51.55. Included was $10.00 in change (Tr. 42). Brewington indicated that when arrested, Brooks was wearing a maroon jacket (Tr. 49).

Approximately twenty to thirty minutes after the robbery (Tr. 23), Mrs. Steele went to the precinct station where Brooks had been taken. There, in a "lineup" at a distance of about six feet (Tr. 30-31) in which Brooks was present she could not identify him as either of the men who had been in the store (Tr. 27-28). In fact, she identified <u>another</u> man entirely (Tr. 28). Indeed, even after the defendant was released on bail, pending trial, he went back to the store, where apparently Mrs. Steele did not recognize him (Tr. 76). After leaving the identification

room, she conversed with several police officers. When defense counsel attempted to probe the subject matter of this conversation, the trial judge barred further cross-examination on the subject (Tr. 32).

Admitted, subject to objection, was a stipulation that a motorcycle police officer, if he were called to testify, would testify that he went over the escape route, found Government Exhibit No. 3, an "overcoat" (Tr. 56) which was light colored, ("beige, white, tan" (Tr. 57)); Government Exhibit No. 4, a black coat and Government Exhibit No 5 and 6 (hats), and that he later brought them to Officer Brewington at the precinct station (Tr. 65). However, as the Court observed, "there is no testimony whatsoever . . . that . . . can put defendant in the coats" (Tr. 62).

On rebuttal and over objection, Mrs. Steele testified that the black overcoat (Government Exhibit No. 3) "looked like" the coat that unidentified man No. 1 had worn in her store (Tr. 101) and the hats (Government Exhibits Nos. 5 and 6) "looked similar" to those worn by the robbers (Tr. 102).

Again over objection, Officer Brewington then testified that the black coat (Government Exhibit No. 3) (the one which "looked like" the one worn by unidentified Robber No. 1) when brought to him by the unidentified motor officer had a .38 caliber pistol in the right hand pocket (Tr. 106).

The burden of Appellant's testimony was that while walking on Georgia Avenue near Mrs. Steele's store, a man in a long black overcoat ran by him and dropped a wallet, that he picked up the wallet and ran after the man, that he heard shots (Tr. 69-72), got scared (Tr. 92)*/ and ran into the bushes at Raymond School Playground. He denied being challenged by Officer Brewington on Tenth Street (Tr. 89) and testified that the first time he saw Brewington was when apprehended in the bushes (Tr. 95). Brooks denied ever having been in the Steele store on November 8, 1966 (Tr. 76) or taking anything from that store (Ibid.). As for the change taken from him at the time of his arrest, Brooks said that he had won it in a poker game (Tr. 75).

Appellant moved for acquittal at the close of the prosecution's case (Tr. 67) and at the close of the evidence (Tr. 111). Both motions were denied.

The jury, inter alia, received instructions as to the elements of aiding and abetting, these instructions being objected to by defense counsel (Tr. 142).

The jury found Appellant "guilty as charged" (Tr. 144), and this appeal followed.

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*/ Officer Brewington denied firing his pistol (Tr. 46).

STATUTES INVOLVED

District of Columbia Code §22-2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810.)

District of Columbia Code §22-105 provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, §908.)

STATEMENT OF POINTS

1. The trial court erred in denying Appellant's motions for acquittal at the close of the prosecution's case, and at the close of the evidence.

2. The trial court erred in permitting the question of guilt as an aider and abettor to go to the jury.

3. The trial court erred by giving contradictory instruction as to the required quantum of proof necessary to convict as an actual principal; and no instruction on the subject relative to a finding of guilt under the aiding and abetting theory.

4. The trial court erred in refusing to permit defense counsel to cross-examine the prosecution's sole eyewitness as to the context of her conversation with a police officer immediately after she had failed to identify the Appellant in the lineup.

5. The prosecutor's mischaracterizations of the evidence in this close circumstantial case substantially prejudiced the Appellant's case.

SUMMARY OF ARGUMENT

1. The evidence in this case is entirely circumstantial. A store on Georgia Avenue was robbed by two men. Robber No. 1 was never apprehended, and one half hour after the robbery, the victim, looking over a police lineup in which Appellant was present, identificd another as Robber No. 2. No one placed the Appellant in the store. A police officer saw two men turning a corner going off Georgia Avenue at a distance of a block. He claims that a few moments later, a few blocks away, he confronted two men, dressed differently than the men he saw turning off Georgia Avenue. The officer claims that the Appellant was one of the two men he saw originally. He claims he confronted these

men, that they fled, and that he subsequently found one of them - the Appellant - hiding in the bushes of a playground and in possession of a wallet taken at the robbery, plus certain currency and change. Certain clothing was found by a police officer in the vicinity of the arrest. The description of this clothing does not clearly jibe with the testimony of the victim and the police officer as to the clothing worn by Robber No. 2, nor with the original police report relative to this clothing.

Balanced against defendant's explanation of possession; his denial of participation in the robbery, the identification of another person by the victim as Robber No. 2, the inconsistencies of the description of the clothing worn by Robber No. 2, and the weak identification of Appellant based on a "block away " glimpse by Officer Brewington, this weak circumstantial case, at the very most, raises "grave suspicion" of guilt. This is not enough to sustain a conviction. Scott v. United States, 232 F. 2d 362, 98 U.S. App. D.C. 105 (1956).

2. For the same reasons as cited above - and for the additional reason that there was no meaningful evidence of a common criminal plan, let alone of purposive and actual participation by Appellant, the jury should not have been allowed to speculate on guilt on an aiding and abetting theory. For the same reasons, the giving of an aiding and abetting instruction prejudiced the Appellant's case by permitting the jury to convict on suspicion alone.

3. The jury was not given any meaningful instruction as to the quantum of proof necessary to convict Appellant either of robbery, as an actual principal, or as an "aider and abettor" under D.C. Code §22-105.

Thus, the jury was first told that it had to find, beyond a reasonable doubt, that the defendant committed each element of the crime charged. Then, without any preliminary reference to D.C. Code §22-105, it was told that it was not necessary that the Appellant had committed each element of the crime. This instruction vitiated any previous reference to the quantum of proof necessary to establish guilt either as an aider or abettor, or as an actual principal - with no reference to the quantum of proof necessary for either such conclusion. The jury thus had contradictory instructions on the quantum of proof required to convict as an actual principal - and none whatsoever as to a conviction as an aider or abettor. Since it cannot be determined on what theory the conviction was based, either error constitutes reversible error.

4. The victim of the robbery was able to describe to the Court only minimal details of Robber No. 2's description. She could remember little or nothing about the description of persons in the police lineup - one half hour after the robbery - a lineup in which Appellant was present. After leaving the identification room, however, she had a conversation with a Detective Rhone and other policemen.

Thereafter, at trial she was able to remember that Robber No. 2 wore a coat "maroon or tan" (Tr. 27). This narrow focus recollection conveniently fit with both Officer Brewington's testimony that Brooks was wearing a "maroon" jacket when arrested (Tr. 49), or his earlier report, later disavowed, that Brooks was wearing a "tan, three-quarter length leather jacket" (Tr. 52-53). The victim was the sole eyewitness to the robbery. Her description of Robber No. 2's clothing is a critical link between the robber and the Appellant. However, when defense counsel attempted to cross-examine her about her conversation with Detective Rhone following the misidentification, his cross-examination was cut off by the trial judge. In the context of this case, the denial of the right to cross-examine the prosectuion's sole eyewitness as to factors which might have influenced her description of Robber No. 2 is reversible error.

5. In order to fortify this circumstantial case, the prosecutor, in addressing the jury, persistently mischaracterized and added to the testimony in order to fill in evidentiary gaps and weaknesses. Thus, he artfully (1) placed clothing discarded on the supposed escape route on the Appellant - although the evidence clearly failed to do so; (2) augmented the amount of change found on the Appellant so as to make it coincide with the amount actually stolen; (3) provided non-existent corroborative testimony to shore up Officer Brewington's "quick-glimpse" identification of the Appellant on Georgia Avenue;

(4) suggested to the jury that the victim had never attempted to identify the Appellant - when in fact she had, and had identified someone else; and finally (5) attempted to dilute the impact of the identification of someone else by the victim by suggesting that she was distraught by the realization that she was being threatened with a loaded gun (Government Exhibit No. 7) when there was no evidence that she knew that a gun was used at the store.

In a case as close as this, the improper argument of the prosecutor requires reversal.

ARGUMENT

I. The Trial Court Erroneously Denied Appellant's Motions for Acquittal */

Under this Court's decision in Cooper v. United States, 218 F. 2d 39, 94 U.S. App. D.C. 343 (1954), the trial judge's ruling on a motion for acquittal must grant the motion "where a reasonable mind has a reasonable doubt of the accused's guilt," for to do otherwise would permit the jury "to speculate without evidence adquate in law," 218 F. 2d at 41, 94 U.S. App. D.C. at 345. And where the trial judge erroneously permits the jury to convict, this Court will reverse and enter a judgment of acquittal, 218 F. 2d at 42, 94 U.S. App. D.C. at 346.

In the case at bar, Appellant made timely motions for acquittal at the close of the prosecution's case (Tr. 67) and at the close of the evidence (Tr. 111). The trial court denied them all. As we shall detail, the evidence against Appellant, almost entirely circumstantial in

*/ In connection with Argument I, the Court is referred to Tr. 20-24, 26-31 37-40, 42-43, 45, 50, 52-59.

nature, was insufficient to raise more than a suspicion that he was one of the men who robbed Mrs. Steele.

The evidence in this case shows that a robbery took place at Mrs. Steele's cleaning shop on Georgia Avenue. In spite of the fact that it was daylight, that the robbers were the only ones in the store, that they both spoke to her, and that they both stayed there for approximately three minutes, the sole eyewitness (the victim, Mrs. Steele) was unable to pick out the defendant from a lineup only one half hour after the robbery. Indeed, from a distance of six feet (with the Appellant present) she identified the wrong man in that police lineup.

What is more, this same eyewitness specifically testified that the coat that the "second man" in the robbery wore (the one allegedly the Appellant) "wasn't an overcoat" (Tr. 27) . . . and that it was maroon or tan, whereas the coats supposedly found on the robber's alleged escape route by the unidentified motor officer included only a black overcoat (Government Exhibit No. 4) and Government Exhibit No. 3, specifically described as an "overcoat" (Tr. 56) by the Government ("beige, white, tan" (Tr. 57)).

Additionally, the victim testified that both men had hats on (Tr. 102), whereas when Officer Brewington first saw two men at turning the corner of Randolph Street, he only "believed" that they had hats on . . . he could not "remember that too well" (Tr. 59).

A few minutes later, on Tenth Street, Officer Brewington saw two men. Neither of these men had coats on (Tr. 50), nor did they apparently have hats on. Nevertheless, Brewington who had only been on the police force for two weeks (Tr. 35) and had never had any instruction on identifying people (Tr. 53) identified them as the two he had seen from the barber shop from a distance of "approximately a block" (Tr. 54) as they were turning a corner (Tr. 37).

As far as the clothing purportedly found on the escape route is concerned, the trial judge correctly observed that "no testimony here . . ..can put the defendant in the coats" (Tr. 62).

Thus, testimony of the sole eyewitness strongly suggests that someone else, rather than defendant, was the No. 2 man in the robbery; and the balance of the testimony (Officer Brewington's and the proffer relative to the testimony of the unidentified motor officer about clothing found on the escape route) is at best ambiguous as placing the defendant in Mrs. Steele's store.

Certainly, to have permitted the question of guilt of robbery to go to to the jury on that evidence alone would have surely been to permit the jury to "speculate without evidence adequate in law" Cooper v. United States, 218 F. 2d 39, 41, 94 U.S. App. D.C. 343, 345 (1954).

However, the only additional operative elements of the evidence consists of the contradicted evidence of flight, and of the possession of Mrs. Steele's wallet, some currency and change by the defendant.

Evidence of flight is a particularly slender reed upon which to base an inference of guilt. As noted by the United States Supreme Court " . . . we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun v. United States, 371 U.S. 471, 483 n. 10 (1963). For, as the Fifth Circuit observed in Vick v. United States, 216 F. 2d 228 (1954) "[f]light alone has been said to be ordinarily 'of slight value . . .'" (Id. at 332) since the Appellant "may have fled because of a sense of guilt, or because he thought that his presence * * * was a suspicious circumstance which might lead to his indictment . . . ." (Id.at 233). And, as Judge Prettyman pointed out in Cooper v. United States, 94 U.S. App. D.C. 218 F. 2d 39, 41 (1954), certain action "as explained by terrorized innocence as well as by a sense of guilt. After all, innocent people caught in a web of circumstances frequently become terror stricken."

In the circumstances of the case at bar, even resolving the disputed testimony about the confrontation and flight on Tenth Street in favor of the Government (the Appellant denies that this confrontation even took place) the evidence of flight is certainly equally consistent with innocence as with guilt. For who is to say that he would not flee if one were to see a person in civilian clothes (Tr. 89) approaching you with a gun. Or even if the person claimed he was a policeman, if, as did

Appellant, you had someone else's wallet in your pocket, and had been previously involved in "a housebreaking in 1962; carrying a dangerous weapon, gun, 1964," (Tr. 5) and had been acquitted on a robbery charge (Tr. 6). The logical nexus between flight and guilt of the crime charged under these circumstances would be so slim as to constitute any resulting conclusion of guilt one based on mere "conjecture and suspicion" and thus impermissible. Vick v. United States, 216 F. 2d 228, 233 (5th Cir., 1954).

As far as the possession of the wallet is concerned, it is true that this Court has upheld convictions (such as grand larceny) based on numerous incriminatory circumstances including the "possession of recently stolen property, unexplained" Edwards v. United States, 78 U.S. App. D.C. 226, 229, 139 F. 2d 365, 368 (1943). But it has never been implied that this inference arising from possession could overcome eyewitness testimony from the victim of the crime indicating that almost immediately following the crime, when confronted by the Appellant she not only could not identify him, but identified someone else standing next or near to the Appellant. The particular significance of the misidentification is that the victim's affirmative action indicates that she had in fact gotten a close enough look at Robber No. 2 to feel that she could identify him. This should be distinguished from the situation where the victim, when looking over the "lineup" which included the Appellant, is unable to identify anyone at all.

In such a case the failure to identify, while having some exculpative value, would be diluted by the inference that perhaps the victim could not identify the Appellant because of poor lighting, lack of opportunity to observe, etc. But here, the fact that she identified someone else, while looking over the Appellant, and failed to identify the Appellant, is strong evidence that the Appellant was not the robber.

The positive identification of another under these circumstances, the apparent conflict in the description of the No. 2 robber's clothing, together with Appellant's denial and explanation of possession, while perhaps enough to create a suspicious circumstance, cannot remove a reasonable doubt of guilt.

In sum, no one can identify the Appellant as Robber No. 2; the victim, while looking at the Appellant, identified someone else; no one can place him in the store during the robbery; no one can place him in the coats allegedly worn by the robbers; the circumstances of his flight are - even accepting the Government's claim of the Tenth Street confrontation - is as consistent with innocence as with guilt. And the possession of the wallet and $10.00 in change (not $14.75 claimed to be robbed) is equally consistent with conclusions of innocence, or larceny or of receiving stolen goods as they are with robbery.

At best, this evidence, almost entirely circumstantial, creates a grave suspicion of guilt. "Great care, however, must be exercised in drawing inferences from circumstances proved in criminal cases, and mere suspicions will not warrant a conviction." Vick v. United States, 216 F. 2d 228, 232 (5th Cir. 1954).

Nor, indeed, can "grave suspicion" Scott v. United States, 232 F. 2d 362, 98 U.S. App. D.C. 105, 107 (1956). Accordingly, we submit that there is "no evidence from which a reasonable mind might fairly conclude guilt [of robbery] beyond a reasonable doubt" Cooper v. United States, 218 F. 2d 39, 41, 94 U.S. App. D.C. 343, 345 (1954)

II. The Evidence Likewise Was Insufficient to Permit a Conclusion Beyond a Reasonable Doubt that Appellant Aided and Abetted in the Robbery */

Not only is the evidence insufficient to support Appellant's conviction as a principal, it is also likewise insufficient to support conviction on the alternative theory that he "aided and abetted" in the robbery within the meaning of D.C. Code §22-105.

As that Section recites, its intent is only to apply to "accessories before the fact" in all crimes the law "heretofore applicable in cases of misdemeanor" - i.e., to make "accessories before the fact" punishable as principals. **/

As the Sixth Circuit Morei decision construing the analagous Federal Statute, 18 U.S. C. §2 establishes:

> "A person is not an accessory before the fact unless there is some sort of active proceeding on his part; he must incite or procure, or encourage the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it." Morei v. United States, 127 F. 2d 827, 830-31 (6th Cir. 1942).

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*/ With respect to Argument II, Appellant desires the Court to read Tr. 17-29, 34, 36-38, 45-48, 52-54, 58, 88-90, 95.

**/ The D.C. Code retains a separate provision (§22-106) providing lesser punishment for "accessories after the fact."

Other Federal decisions under 18 U.S.C. §2 likewise stress the necessity of active participation in a common criminal plan to support a conviction under the aiding and abetting theory. See Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (Appellant must "seek by his action" to make criminal venture succeed) Johnson v. United States, 195 F. 2d 673, 675 (8th Cir. 1952) (aider and abettor must share "criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed"); United States v. Peoni, 100 F. 2d 401, 402 (2nd Cir. 1938) (statute contemplates "purposive attitude" and active participation in criminal venture). Cf. Stevens v. United States, 319 F. 2d 733, 115 U.S. App. D.C. 332 (1963) (requiring "guilty knowledge" in unauthorized use cases); Kemp v. United States, 311 F. 2d 774, 114 U.S. App. D.C. 88 (1962) (same); Lanham v. United States, 185 F. 2d 435, 436, 87 U.S. App. D.C. 357, 358 (1950) (requiring "reasonable conclusion of guilty participation").

Yet, here there is no meaningful evidence of a common criminal plan, let alone of "purposive" and active participation by Appellant. The only witnesses who saw two men on Georgia Avenue were the victim and Officer Brewington. But the victim identified someone else as Robber No. 2; Officer Brewington only saw two men

turning a corner from a distance of a block and these men were wearing coats. The first time that anyone even claims seeing Brooks with the alleged unidentified Robber No. 1 is three and a half blocks away on Tenth Street, several moments after the robbery. And Brooks denies this confrontation took place. Even assuming that it took place, by this time any robbery would have been complete and any action by Appellant could not have made him an accessory before the fact unless carried out pursuant to a prearranged plan. See Rizzo v. United States, 275 F. 51 (3rd Cir. 1921). But there was no direct evidence of any plan. Cf. Scott v. United States, 98 U.S. App. D.C. 105, 106 n. 1, 232 F. 2d 362, 363, n. 1.

The evidence against Appellant was thus much more speculative than that held insufficient to support a conviction in Scott v. United States, 232 F. 2d 362, 98 U.S. App. D.C. 106 (1956). There Scott himself was seen with the "clearly guilty" principal, Pell, across the street from the scene of the crime within five minutes prior to a robbery. The prosecution's theory was that he acted as "lookout." When arrested, Scott falsely denied knowing Pell, told an implausible story, and was found in possession of gun grips which "'matched pretty good'" Pell's gun, 232 F. 2d at 363, 98 U.S. App. D.C. at 106. Yet, the Court

reversed the conviction because the evidence, although sufficient to create "grave suspicion" that Scott aided and abetted Pell nevertheless left "reasonable doubt as to Scott's participation." 232 F. 2d at 364, 98 U.S. App. D. C. at 107.

Pursuant to this recognized principle the trial judge should have directed Appellant's acquittal here and not permitted the jury to speculate as to Appellant's guilt on the basis of inarticulated and unsupportable theories of "aiding and abetting."

III. In Light of the Evidence, the Giving of an Instruction on Aiding and Abetting Was Prejudicial to Appellant */

It is elementary that a "charge to a jury should be drawn with reference to the particular facts of the case on trial" Collazo v. United States, 196 F. 2d 573, 578; 90 U.S. App. D.C. 241, 246 (1952), and not "a supposed or conjectural state of fact, of which no evidence has been offered" United States v. Breitling, 20 How. 252, 254, 15 L. Ed. 900, 902 (1858). Moreover, the Appellant is entitled to a charge which "does not unduly emphasize the theory of the prosecution," Perez v. United States, 297 F. 2d 12, 16 (5th Cir. 1961) and does not mislead the jury on any significant point. Bollenbach v. United States, 326 U.S. 607, 612 (1946).

The charge given in this case was not only unnecessary but actually encouraged the jury to convict Appellant on the basis of unarticulated and improper legal theories.

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*/ In connection with Argument III, the Court is referred to Tr. 17-29, 34, 36-38, 45-48, 52-54, 58, 88-90, 95.

As has been shown, nothing in the activities of Appellant or other man establish that degree of active participation in a common plan essential to an aiding and abetting conviction. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); Johnson v. United States, 195 F. 2d 673-75 (8th Cir. 1952); Morei v. United States, 127 F. 2d 827, 830-31 (6th Cir. 1942); United States v. Peoni, 100 F. 2d 401, 412, (2nd Cir. 1938). There was no evidence that Appellant conceived the idea of the theft or that he advised anybody concerning it. Cf. Scott v. United States, 232 F. 2d 362, n. 1, 98 U.S. App. D.C. 105, 106 n. 1 (1956).

Since nothing in the "particular facts of the case on trial" justified a conclusion that Appellant had "aided and abetted" in the crimes charged, the instruction as to aiding and abetting was prejudicially misleading. By unduly emphasizing the aiding and abetting theory the Court failed to provide an "appropriate legal yardstick" to measure Appellant's conduct and instead gave the jury a deceptively convenient rationale to convict on the basis of any stray suspicions developed during the course of the trial. Cf. Bollenbach v. United States, 326 U.S. 607, 614 (1946).

IV. Trial Court Gave Contradictory Instruction as to the Necessity of Proving Each Element of Robbery Beyond a Reasonable Doubt - and Gave the Jury No Yardstick Whatsoever on the Quantum of Proof Required to Convict Under D.C. Code §22-105 */

It is well established that each essential element of the offense charged must be proved beyond a reasonable doubt. McAffee v.

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*/ In connection with Argument IV, the Court's attention is invited to Tr. 130, 135, 139, 140.

United States, 105 F. 2d 21, 70 App. D.C. 142, 151 (1939).

However, the instructions of the trial judge were so contradictory in this respect as to leave the jury with either erroneous guidance or no guidance whatsoever on this critical issue.

Thus, early in his charge, the trial judge properly instructed the jury that "Unless the Government proves beyond a reasonable doubt that the Appellant has committed each element of the offense with which he is charged, you must find him not guilty" (Tr. 130).*/

Similarly, the trial court told the jury that " . . . the essential elements of the offense of robbery, each of which the Government must prove beyond a reasonable doubt,*/ are . . . ." (Tr. 135) and duly explained each element thereof.

Then, however, without even an introductory reference to the existence of D.C. Code §22-105, (the aiding and abetting statute) the trial judge then told the jury (Tr. 139) precisely the opposite of what he had told them at Tr. 130:

> "Now, in considering whether or not the defendant is guilty of robbery, it is not necessary that he has committed each of the acts or elements which constitute the crime." (Tr. 139) (emphasis added).

At this point, the jury must have been hopelessly confused as to the quantum of proof necessary to convict for robbery - having been told first that the Government had to prove beyond a reasonable doubt that the Appellant had committed each of the elements

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*/ (emphasis added).

of robbery (Tr. 130-131) - and later that this was not necessary at all (Tr. 139), thus obliterating the requirement of proof beyond a reasonable doubt as to the commission of each element by the Appellant as would be required in order to convict as an actual principal. And thereafter, the trial court immediately proceeded to instruct the jury that alternatively:

> "If you find from the evidence that Marion Brooks either aided or abetted another unknown principal offender in the commission of the offense, or committed each of the acts constituting robbery, then you may find him guilty as charged." (Tr. 139).

As is obvious from the face of the transcript, this new instruction as to conviction (phrased with the alternative reference to a conviction as an actual principal or as a constructive principal under the aiding and abetting theory), made no reference whatsoever to the critical issue of the quantum of proof required for a conviction on either theory.

Thus, as to a possible conviction under D.C. Code §22-105, the jury (which had just been told that the Appellant need not have committed each of the elements of robbery) was completely uninstructed as to what quantum of proof was required. For as to "aiding and abetting," there is not even a suggestion that the jury could not convict unless they found "beyond a reasonable doubt" that he was an "aider and abettor" (Tr. 139, 140). */

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*/ See, e.g., United States v. Garguilo, 310 F. 2d 249 (2nd Cir. 1962) "Never were the jurors told in plain words what more precise and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime . . . ." 310 F. 2d at 254 (emphasis added).

The omission of the "beyond a reasonable doubt" standard is especially critical in relation to the aiding and abetting instruction. For since the Appellant was never placed in the store, or in the clothes purportedly found on the escape route - and since another man had been identified as the robber by the victim just one half hour after the crime - is is highly probable that the jury convicted him under the aiding and abetting theory.

At any rate, whether the jury was confused as to both the quantum of proof necessary for a conviction as an actual principal, or as a "constructive" principal under the aiding and abetting theory, or on either count, the conviction must be reversed, for it is fundamental that "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946).

As far as a possible conviction as a real principal is concerned, the fact that an earlier instruction may have correctly stated the law does not cure the error, for "where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error" United States v. Donnelly, 179 F. 2d 227, 233 (7th Cir. 1950); Frank v. United States, 220 F. 2d 559 (10th Cir. 1955); McFarland v. United States, 85 U.S. App. D.C. 19; Nicola v. United States, 72 F. 2d 780 (3rd Cir. 1934); Drossos v. United States, 2 F. 2d 538 (8th Cir. 1924).

Moreover, error of this nature is so fundamental that it is traditionally noted even though no exception was taken to the instruction at trial. See, e.g., Polansky v. United States, 332 F. 2d 233 (1st Cir. 1964); Smith v. United States, 230 F. 2d 935 (6th Cir. 1956).

V. Denial of Right of Appellant to Cross-Examine Sole Eyewitness as to Conversation With Police Following Initial Identification of Another as Robber No. 1 Was Prejudicial Error */

A "full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called and a denial of this right is prejudicial and fatal error." Heard v. United States, 255 F. 829, 832 (8th Cir. 1919); Lindsey v. United States, 77 U.S. App. D.C. 1, 2, 133 F. 2d 368, 369 (1942).

An important witness in this case was the victim, Florence Steele. Her testimony that Robber No. 2 was wearing a "maroon or tan" coat (Tr. 27) is a critical link between the two men seen turning the corner on Randolph Street by Officer Brewington and the Appellant, who was arrested three and a half blocks away in a "maroon" outer garment (Tr. 49), and especially so since the "No. 2 man" who was seen turning the corner off Georgia Avenue and onto Randolph Street had been variously described as wearing a "light coat," (Tr. 50) and Government Exhibit No. 3, had at various times been described as a "tan three quarter length leather jacket" (Tr. 52-53) and a "beige, white, tan," overcoat (Tr. 56-57).

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*/ In connection with Argument V the Court's attention is invited to Tr. 27-32; Tr. 27; Tr. 50-57.

As the record shows, Mrs. Steele, although she identified someone else as Robber No. 2, testified that she could remember almost nothing as to what any of the men in the police lineup wore (Tr. 30), including the Appellant, Marion Brooks. This was one half hour after the robbery. Yet, subsequently she could testify that the robber one half hour before wore a "maroon or tan" jacket. The record also shows that when she left the identification room, she had a conversation with Detective Rhone (Tr. 31), but when defense counsel attempted to ask her about this conversation, cross-examination was barred by the trial court. Since Mrs. Steele could not identify Appellant and could not even remember what he or others wore in the lineup, but after speaking to Detective Rhone outside the identification room could testify that Robber No. 2 was wearing a "maroon or tan" coat - which tied in with Officer Brewington's description of what Appellant was wearing when arrested - we submit it was reversible error to bar this line of inquiry.

In the context of this case, Mrs. Steele's description of the clothing worn by Robber No. 2 was critical. Defense counsel was precluded from inquiring into factors which may have influenced her in aiming at that description, i.e., the content of her conversation with Detective Rhone after identifying someone else in a lineup including Appellant.

The Supreme Court has held that "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to test,

without which the jury cannot fairly appraise them" Alford v. United States, 282 U.S. 687, 692 (1931).

The Appellant was denied this opportunity as regards the only eyewitness to the crime he is alleged to have committed, and as to a critical aspect of her testimony. In such circumstances, the error requires reversal. Lindsey v. United States, 77 U.S. App. D.C. 1, 133 F. 2d 368 (1942).

VI. The Prosecutor's Mischaracterization of the Evidence to the Jury Substantially Prejudiced Appellant's Case */

As is apparent from the foregoing, the Government's case is essentially, if not entirely, based on circumstantial evidence, some of it controverted. The Appellant was never placed in the store, another was identified by the victim as Robber No. 2; there is conflict as to the description of the clothing worn by Robber No. 2 and the clothing found on the supposed escape route; Officer Brewington's identification of Appellant on Georgia Avenue as running with another purported robber is based on a quick look at two men turning a corner at a distance of one block.

Knowing the weakness of his case, the prosecutor repeatedly and improperly attempted to shore up the gaps by providing the jury, through "argument," "facts" that converted the spotty evidentiary patchwork actually developed at trial into a smooth fabric clearly labeled "guilt."

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*/ In connection with Argument VI, the Court's attention is invited to Tr. 113-117, 124, 125-26.

1. For example, at Tr. 113 the prosecutor began, confusingly, but seemingly innocuously, to tell the jury "As you recall, the first robber with the long black coat, which we found later discarded on the street; two coats, two hats similar to the one the men wore - a black coat with a gun, and we can infer clearly that people aren't discarding coats on the street haphazardly and that this was the clothing worn by the two bandits" (Tr. 113).*/

A few moments later, the prosecutor is now found talking about the "two men as Mrs. Steele described" having "obviously shed their clothing" (Tr. 114). Combined with the block away identification of the Appellant by Officer Brewington as the man turning the corner from Georgia Avenue onto Randolph Street, the prosecutor has at this point almost put the coat on the Appellant.

From there, it is just a short step to the final claim that the testimony actually had put the coat specifically on Marion C. Brooks, the Appellant. And the prosecutor took that step. As he said at Tr. 115:**/

> "As we know, he [the reference is specifically to the Appellant] had already shed a coat and a hat, although he still wore a maroon jacket, and as the officer testified, and Mrs. Steele, as I recall, also said that the second man had a maroon or other colored jacket on."

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*/ The evidence is that the coat described by Mrs. Steele as having been worn by Robber No. 1 did not match the description of the second coat found on the street. (Government Exhibit No. 4).

**/ The use of "as we know" compounds the prejudice of the misstatement of the evidence, since it implied that this was within the personal knowledge of the prosecutor. See Berger v. United States, 295 U.S. 78, 88 (1935).

At that critical point, by clearly misstating the evidence, the prosecutor created an actual nexus between the clothing dropped on the escape route and the Appellant, when in fact the state of the evidence on this issue was such that the trial judge had observed "there is no testimony here whatsoever, there is no one that can put . . . none of the witnesses including the eyewitness can put the Appellant in the coats (Tr. 62).

2. But there were other gaps to fill, and they were. Thus, elsewhere in his summation the prosecutor told the jury, "And what did Marion Brooks have on him some three or four minutes after the robbery? Florence Steele's wallet, the money stolen, all the change, all the currency" (Tr. 115).

Actual testimony, however, shows that the Appellant had the wallet, the currency and "about $10.00 worth of change" which was initially taken from him by the police officer (Tr. 142), and $2.00 more kept by the Appellant (Tr. 79) making a total of $12.00 - not $14.75 which then would have been "all the change" as claimed by the prosecutor (Tr. 115). The critical nature of this claim by the prosecutor is that the possession of "all the change" taken from Mrs. Steele's store (instead of a smaller amount, as the evidence shows) (1) gravely undercut Appellant's testimony that he won the change which he had on him at the time of arrest in a poker game, and (2) would be significantly strengthened circumstantial evidence of his involvement in the robbery. Conversely, the true fact (as borne out by the record) that an amount less than that taken from the store was found on him - would strengthen the credibility of his claim that he had

acquired it from another source, especially in view of the fact that the police officer who covered the escape route and found the discarded clothing apparently found no evidence of the other $2.00 in change discarded on the route.

3. On the subject of identification, the prosecutor's summation was no less misleading.

For example, one of the weak links in the Government's case was the fact that Officer Brewington claimed to identify the two men he claimed he had confronted running on Tenth Street (one of whom Brewington claimed was the Appellant) as the same two men he had seen on Georgia Avenue when he came out of the barber shop - even though he first saw them on Georgia Avenue as they were turning a corner running a block away (Tr. 37, 54). The actual testimony was hardly uniform. Mrs. Steele said that one of the men in the store had on a "short coat . . . maroon or tan" not an overcoat (Tr. 27); she never described the two men she claims she saw running down the block; Officer Brewington identified an overcoat as the light beige, white or tan coat found on the escape route, not a "short coat . . . maroon or tan" and the barber did not testify at all!

Yet, the prosecutor told the jury " . . . and as soon as Mrs. Steele cried out, he [Brewington] and the barber took off in the vehicle. They saw the men running, two men as Mrs. Steele had described, and a few blocks away they see them . . . . " (Tr. 114). (emphasis added)

The testimony, however, shows that (1) the barber and Brewington ("they") did not see the men running - only Brewington so testified, (2) that Brewington did not see the "two men, as Mrs. Steele had described" (Tr. 114) - his description and later identification of the coats differed from Mrs. Steele's and (3) there is no evidence that a few blocks later "they [Brewington and the barber] saw "them" [the two men on Georgia Avenue] - because only Brewington testified as to the Tenth Street confrontation.*/

The prejudicial effect of the prosecutor's misstatement is obvious, for he thus eliminated the discrepancy in descriptions and substantially strenghtened the credibilitiy of Brewington's Tenth Street identification of the Appellant as the man he saw running with another back on Georgia Avenue - all through misstatements of the evidence and reference to non-existent corroboration by someone who never testified.

4. Tidying up the "on-the-scene situation immediately after the robbery, the prosecutor - obviously concerned by Mrs. Steele's testimony about the coats and hats, as well as her identification of another as Robber No. 2 - then told the jury:

> "And she [Mrs. Steele] never attempted to identify the defendant to you, she never saw the second man" (Tr. 124).

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*/ Similarly objectionable is the prosecutor's later reference that three minutes after the robbery "he [Brewington] said to himself, I have got the thief, because he had" (Tr. 125-26). There was no such testimony.

The record, however, shows that Mrs. Steele did see the second man clearly enough to give a description of the clothing he was wearing (which did not appear to jibe with the descriptions given by Brewington, or with the prosecution's theory that the Appellant had discarded the clothing he had worn at the store) and enough to have actually attempted to identify the Appellant in a lineup and picked out the wrong man (Tr. 29).

And on the misidentification matter, the prosecutor attempted to further dissipate the exculpative weight of that incident by telling the jury:

> "You can imagine how nervous and upset this lady was, especially when after the coat comes in, the realization hits that there was a live .38 caliber pistol in that coat." (Tr. 124).

The record, however, fails to show that Mrs. Steele, at any time, was aware that any of the robbers had a pistol, much less that the particular pistol referred to by the prosecutor and shown to the jury was even in her store. The additional vice of this bold misstatement (and its obvious purpose) is shown by the prosecutor's original closing to the jury: "And we urge you to find in this case a verdict of guilty, as we know we are dealing with dangerous invididuals" (Tr. 117).*/

Having shored up the record with references to non-existent testimony and other misstatements, the prosecutor asked the jury to find

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*/ The prosecutor had set the stage for this appeal to the jury by implying that the evidence showed that there was a .38 caliber pistol used in the robbery.

> "These were dangerous people, because, as we put in evidence, there was a loaded .38 caliber pistol, with the shells here, also, in that right front pocket" (Tr. 113).

"on these facts" that the Appellant was one of the robbers (Tr. 117). And on "these facts," they did. But as shown above, in many critical respects, they were not the facts shown by the record.

As noted, this Court in King v. United States, ____ U.S. App. D.C. ____ 372 F. 2d 383, 396-97 (1967), "The particular vice of misconduct on the part of a prosecutor is the confidence of the average jury that the prosecuting attorney is faithfully observing his obligation as the representative, not of any ordinary party to the controversy, but of an impartial sovereign, whose interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78 (1967).

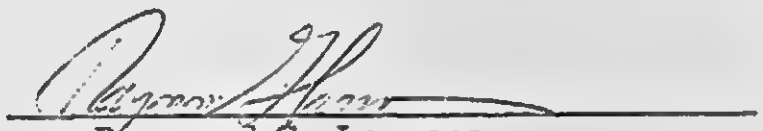
In the instant case, the prosecutor's account of the testimony was in many critical instances erroneous and prejudicial to the Appellant's case. It is not a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where all the evidentiary gaps in this case - based almost entirely on circumstantial evidence in the first place - were filled by "insinuations and assertions calculated to mislead the jury." (Ibid. at 85). In short, what the prosecutor could not prove by testimony, he supplied in argument, artfully and persistently, and "with a probable cumulative effect on the jury which cannot be disregarded as inconsequential" Berger v. United States, supra at 89. We submit that the prosecutor's pattern of argument to the jury in this close case was so misleading in the critically weak areas of the Government's case, and that prejudice to the cause of the accused is so highly probable,"

that this Court would not be "justified in assuming its non-existence" Berger v. United States, supra at 99. And where this Court cannot say that the improper suggestions and mischaracterizations of the evidence are "not responsible, in some degree at least, for the convictions . . . ." the convictions must be set aside and the case remanded for a new trial. Jones v. United States, 119 U.S. App. D.C. 213, 214-15, 338 F. 2d 553, 554-55 (1964).

CONCLUSION

For the foregoing reasons the conviction should be reversed.

Respectfully submitted,



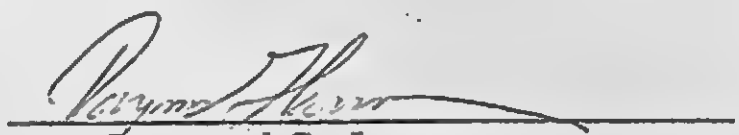
Raymond G. Larroca

800 World Center Building
Washington, D. C. 20006

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 1967 a copy of the foregoing Brief for Appellant was served by United States Mail, postage prepaid, to David G. Bress, United States Attorney, Room 3600a, United States Courthouse, Washington, D. C. 20001.



Raymond G. Larroca

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,011

MARION C. BROOKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
CARL S. RAUH,
Assistant United States Attorneys.

Cr. No. 1394-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Was the evidence sufficient to sustain a conviction for robbery, where (a) appellant, having been pointed out by the complainant, was chased from the scene of the robbery by a police officer, (b) appellant was arrested within 5 minutes of the robbery hiding in some bushes on a school playground, and (c) appellant, when arrested, had on his person the stolen wallet and money of the complainant?

2) Was appellant denied his right to cross-examine the complainant concerning a conversation she had had with a police officer where (a) appellant did cross-examine the complainant generally on this matter, and (b) appellant voluntarily abandoned his efforts to continue to cross-examine the complainant concerning her conversation with the police officer?

3) (A) Should the trial court have instructed on aiding and abetting where (a) Robber No. 1 entered the complainant's shop and *forced* her in the back room, and then appellant (Robber No. 2) entered the shop and stole money from the front room, and (b) the jury might not be convinced that appellant personally used force or fear although they could easily find that appellant was actively aiding and abetting Robber No. 1?

(B) Were the trial court's instructions on burden of proof, robbery and aiding and abetting so "contradictory" and "hopelessly confused" that the jury was unable to understand them, where (a) appellant's diligent trial counsel did not feel they were "contradictory" or "hopelessly confused" and therefore did not object or request a clarification, and (b) the instructions read as a whole are quite clear?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,011

MARION C. BROOKS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Brooks was charged with robbery in violation of 22 D.C. CODE § 2901 (1961). After trial before a jury and District Judge Robinson on April 5, 1967, the jury returned a verdict of guilty as charged (Tr. 1, 144). Appellant was sentenced to imprisonment for 5 to 15 years.

The Government's Case

The Government's evidence at trial showed that at about 9:05 a.m. on Tuesday, November 8, 1966, Mrs.

Florence L. Steele, the owner of Flo's Custom Cleaners at 3933 Georgia Avenue, N.W., Washington, D.C., was in her dry cleaning shop open for business (Tr. 17). At this time Robber No. 1 [1] wearing a hat [2] and a long black overcoat [3] came to the door of the shop which was locked as usual (Tr. 18, 20, 99, 102). Mrs. Steele opened the door and Robber No. 1 entered; he pretended that he had left some clothes at the shop and had lost the ticket; Mrs. Steele looked in her record book but, of course, was unable to find the name given by Robber No. 1 (Tr. 18, 20). Suddenly, Robber No. 1 "stepped back and put his right hand in his pocket and said: 'I came in here for your money; give me your money'" (Tr. 20). He then "came around the counter and pushed me against the desk and said, 'Open the cash register; open the cash register'" (Tr. 20). Mrs. Steele opened the cash register and then was forced in the back room (Tr. 21, 27). At this point Robber No. 2 entered the shop and asked Mrs. Steele where her pocketbook was; Mrs. Steele told him the pocketbook was on the window seat (Tr. 21). Robber No. 2 had his head down when he entered so Mrs. Steele only "got a slight glimpse" of him, but she did notice that he was wearing a "checkered hat" and a "maroon or tan" "short coat" (Tr. 21, 26, 27). Robber No. 1 kept Mrs. Steele in the back room while Robber No. 2 stayed in the front room; stolen from the front room were Mrs. Steele's billfold containing $25 or $27 and some $16.75 from the cash register which included "about $14.75 in change" (Tr. 21, 23-25). After a short time, Robber No. 2 entered the back room and said, "All right, let's go" (Tr. 21). The two robbers then left by the front door (Tr. 21-22). Mrs. Steele ran out after them and "saw them going south on Georgia Avenue" (Tr. 22). She hollered that she had been robbed (Tr. 22).

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[1] Robber No. 1 was not appellant Brooks (Tr. 20, 26). Appellant Brooks was Robber No. 2.

[2] Rebuttal testimony.

[3] Rebuttal testimony.

Hearing the screams of Mrs. Steele that she had been robbed, Officer Moses E. Brewington, Sixth Precinct, Metropolitan Police Department, who was waiting for a haircut in the barber shop one door away from Mrs. Steele's shop, came running out of the barber shop with the barber (Tr. 22, 35-37, 47). Mrs. Steele pointed out to Officer Brewington the two robbers fleeing south on Georgia Avenue (Tr. 22). Officer Brewington observed the robbers heading south on Georgia Avenue and turn west on Randolph Street; one was wearing a "long black coat" and the other was wearing a "light coat" ("more a white than it is tan," "more beige than tan," "beige, white, tan"); Officer Brewington believed they both were wearing hats (Tr. 37, 47, 48, 50, 53, 54, 57, 59). Officer Brewington and the barber got in the barber's car and pursued the two robbers (Tr. 37, 47). Starting in the 3900 block of Georgia Avenue which is between Shepherd and Randolph Streets, Officer Brewington and the barber proceeded south on Georgia Avenue to Randolph Street, and then west one block on Randolph Street to Tenth Street (Tr. 17, 37, 47). Spotting the two robbers on Tenth Street, Officer Brewington and the barber proceeded south on Tenth Street (Tr. 37, 48, 50). The robbers were no longer wearing their outer garments; the outer coats were gone (Tr. 50-51). Officer Brewington alighted from the automobile and from about 10 yards away confronted the robbers by identifying himself as a police officer (Tr. 37, 48). About "3 or 4 minutes" had passed from the time Officer Brewington first saw the two robbers on Georgia Avenue until he saw them again on Tenth Street (Tr. 47). The robbers upon being confronted by Officer Brewington took off running (Tr. 38, 48). They ran east onto the Raymond School playground where they split up (Tr. 38, 48). Officer Brewington went around the school building and found one of the robbers he had been chasing hiding in the bushes; he was lying on his stomach in the bushes (Tr. 39, 48). This man, who was identified in court as appellant Brooks, was

placed under arrest (Tr. 38, 39). No more than a minute had passed from the time Officer Brewington had confronted appellant on Tenth Street until appellant was found hiding in the bushes and placed under arrest (Tr. 37, 38). When arrested, appellant was wearing a maroon jacket; he was not wearing a hat (Tr. 46, 49). Appellant was searched and found in his right rear pocket was Mrs. Steele's billfold (government exhibit 1) containing her social security card, her driver's permit, her mother's picture and some money (Tr. 25, 40). Also found loose in his pockets was paper currency and about $12 worth of change (Tr. 42).[4] The total amount of money seized from appellant was approximately $51 (government exhibit 2) (Tr. 42).

Appellant was immediately taken to the police station and placed in a lineup (Tr. 22, 27-28). Mrs. Steele viewed the lineup, but was unable to identify appellant as one of the robbers (Tr. 23, 28, 33-34). After the lineup Mrs. Steele went to the hospital (Tr. 28).

By stipulation between Government and appellant, it was agreed that a motorcycle officer went over the escape route and found some hats and coats discarded in the street; they were brought to the precinct and turned over to Officer Brewington who marked the clothing (Tr. 65). The discarded clothing consisted of two checkered hats, a black coat and a "beige, white, tan" coat which were admitted into evidence (government exhibits 3, 4, 5 and 6) (Tr. 51, 55, 56-57, 65). The coats were those that Officer Brewington had observed the robbers wearing as they ran south on Georgia Avenue and turn west on Randolph Street (Tr. 59). Mrs. Steele testified that the long black coat was like the one Robber No. 1 was wearing and the two checkered hats in evidence were similar to the ones worn by the robbers (Tr. 99, 101-02).[5] A fully

[4] Officer Brewington seized about $10 in change from appellant's person; in addition, appellant had $2 in change which he was allowed to keep (Tr. 42-43, 79).

[5] Rebuttal testimony.

loaded .38 revolver was found in the right pocket of the long black coat and admitted into evidence (government exhibit 7) (Tr. 105-107, 109).[6]

Appellant's Defense

Appellant denied committing the robbery (Tr. 76). His story was that he was walking up Georgia Avenue near the corner of Shepherd Street at approximately 9:00 a.m. on November 8, 1966 (Tr. 68-69, 71, 83). At this time a fellow in a long black coat ran past appellant heading north on Georgia Avenue and dropped a billfold (Tr. 69, 71-72, 84). Appellant picked up the billfold and chased the man in the long black coat in order to give him the billfold back (Tr. 72, 88). While appellant was chasing the man in the long black coat, appellant heard somebody fire two shots; he became frightened and jumped into some hedges on the Raymond School playground where Officer Brewington arrested him (Tr. 72, 92-93).[7] Appellant admitted that he had no witnesses who heard the shots nor did he make an effort to find anyone in the neighborhood near the Raymond School who heard the shots (Tr. 92, 94).

Appellant admitted having Mrs. Steele's billfold on his person when he was arrested and some paper currency (Tr. 74-75). He also admitted having a large quantity of change on his person, but claimed that he had won this in a poker game he had had with eleven of his fellow employees at the Smithsonian Institute (Tr. 74, 75, 80). Although appellant had been working with these eleven employees for six months, he could only give the partial name of four of them ("Pete," "Hall," "Jackson," and "Palmer") (Tr. 80-81). Nobody from the poker game was present in court to testify for appellant nor had appellant made any attempts to have them in court to testify (Tr. 81, 94).

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[6] Rebuttal testimony.

[7] Officer Brewington testified that he did not fire his service revolver (Tr. 46, 109).

Appellant also claimed that he had not been on Tenth Street, that he was not confronted by Officer Brewington on Tenth Street and that he did not flee from Officer Brewington (Tr. 73, 89-90).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 105, provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

I.

The Government's evidence was sufficient to sustain appellant's conviction for robbery. The Government proved that Robber No. 1 entered the complainant's dry cleaning shop and forced her in the back room; while the complainant was in the back room, Robber No. 2 entered the shop and stole complainant's billfold and money. The robbers then fled. The complainant pointed out the two fleeing robbers to a nearby police officer who gave chase.

Within 5 minutes this police officer arrested one of the fleeing robbers who was hiding in some bushes on a school playground. The captured robber was the appellant Brooks. A search of appellant's person revealed the complainant's billfold and money.

II.

Appellant contends that he was barred by the trial court from cross-examining the complainant about a conversation she had had with a police officer. Actually, appellant did cross-examine the complainant about this conversation. However, when appellant realized he had misunderstood the testimony, he voluntarily abandoned his efforts to continue to cross-examine the complainant concerning her conversation with the police officer.

III.

Appellant contends (1) that the trial court should not have instructed on aiding and abetting under the facts of this case and (2) that the trial court's instructions on burden of proof, robbery and aiding and abetting were so "contradictory" and "hopelessly confused" that the jury could not have understood them. First, on the facts of this case, there is no doubt that appellant was actively participating in the robbery as Robber No. 2. However, it is possible on these facts that the jury might not be convinced beyond a reasonable doubt that appellant personally used force or fear to steal the property. It is for this reason that the jury was instructed on aiding and abetting and under the facts of this case, such an instruction was proper. Second, appellant's diligent trial counsel did not feel that the instructions on burden of proof, robbery and aiding and abetting were "contradictory" and "hopelessly confused" and therefore did not object or request a clarification. Furthermore, the instructions read as a whole are quite clear.

ARGUMENT

I. The evidence was sufficient to sustain the jury verdict of guilty.

(Tr. 17, 18, 20-21, 22, 23-25, 26, 27, 28, 33-34, 37, 38, 39, 40-43, 46, 47, 48, 49, 50, 51, 53, 54, 55-57, 59, 65, 79, 99, 101-102)

Appellant's primary contention on appeal is the insufficiency of the Government's evidence. Viewing the Government's evidence in its most favorable light,[8] the prosecution established the following:

At 9:05 a.m. on November 8, 1966, Robber No. 1 entered Mrs. Steele's dry cleaning shop and shoved her in the back room; Robber No. 2 then entered the shop and stole Mrs. Steele's billfold containing money; Robber No. 2 also stole paper currency and a large quantity of change from the cash register (Tr. 17, 18, 20-21, 23-25). The robbers fled, after Robber No. 2 said, "All right, let's go" (Tr. 21-22). Mrs. Steele ran out of her shop and hollered that she had been robbed; she pointed out the fleeing robbers to Officer Brewington who observed them and gave chase (Tr. 22, 37, 47, 48). Within 4 minutes, Officer Brewington found these same two robbers 3½ blocks away (Tr. 37, 47, 48, 50). Upon being confronted by Officer Brewington, the robbers took off running onto the Raymond School playground (Tr. 38, 48). About a minute later, one of the robbers was found hiding in some bushes on the Raymond School playground (Tr. 37-38, 39, 48). The captured robber, who was appellant Brooks

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[8] In reviewing the sufficiency of the evidence, this Court "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). See *Ingram* v. *United States*, 360 U.S. 672 (1959); *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford* v. *United States*, —— U.S. App. D.C. ——, 375 F.2d 332 (1967).

and Robber No. 2,[9] was placed under arrest (Tr. 38, 39). A search of appellant's person revealed Mrs. Steele's billfold containing money, an amount of paper currency and a large quantity of change (Tr. 25, 40-43). Approximately, $14.75 in change was stolen from Mrs. Steele's cash register; appellant had in his possession approximately $12 in change (Tr. 24, 42-43, 79).[10]

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[9] Mrs. Steele testified that appellant was not Robber No. 1 (Tr. 20, 26). Mrs. Steele had a good opportunity to observe Robber No. 1 during her conversation with him involving the lost cleaning ticket and during her confinement with him in the back room (Tr. 20-21). Therefore, appellant was Robber No. 2. Furthermore, Robber No. 2 stole Mrs. Steele's billfold and the money out of her cash register; appellant was arrested with the billfold and the money on his person (Tr. 21, 23-25, 40-43).

[10] There was quite a bit of evidence at trial concerning the clothing of the two robbers and the clothing found discarded in the street used as the escape route. This testimony corroborates the Government's evidence that appellant was one of the two fleeing robbers that Mrs. Steele had pointed out to Officer Brewington immediately after the robbery.

Mrs. Steele observed Robber No. 1 wearing a hat and a "long black overcoat" and Robber No. 2 wearing a "checkered hat" and a "maroon or tan" "short coat" (Tr. 21, 27, 99, 102). She pointed these two robbers out to Officer Brewington as they were fleeing south on Georgia Avenue (Tr. 22). Officer Brewington observed them fleeing; one was wearing a "long black coat" and the other one was wearing a "light coat" ("more a white than it is tan," "more beige than tan," "beige, white, tan"); they both were wearing hats (Tr. 50, 53, 54, 57, 59). Three to four minutes later when Officer Brewington observed the robbers 3½ blocks away, they had discarded their outer garments; "the big coats were gone" (Tr. 47-48, 50-51). Appellant took off running upon being confronted by Officer Brewington, but was captured one minute later hiding in some bushes (Tr. 37-39, 48). When arrested appellant was wearing a maroon jacket; he was not wearing a hat (Tr. 46, 49). Found discarded in the street used as the escape route were a black coat, a "beige, white, tan" coat and two checkered hats (Tr. 51, 55-57, 65). These items were admitted in evidence (Tr. 65). Officer Brewington testified that the black coat and the "beige, white, tan" coat were the ones that the robbers had been wearing as they ran south on Georgia Avenue and west on Randolph Street (Tr. 59). Mrs. Steele testified that the long black coat was like the one Robber No. 1 was wearing and the two checkered hats were similar to the ones worn by the robbers (Tr. 99, 101-02).

The evidence as to appellant's guilt was overwhelming. (1) Appellant was in exclusive possession of stolen property (Mrs. Steele's billfold, a large quantity of change and paper currency) five minutes after the robbery without a satisfactory explanation.[11] See *Bray* v. *United States*, 113 U.S. App. D.C. 136, 139-41, 306 F.2d 743, 746-48 (1962); *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 229-30, 139 F.2d 365, 368-69, *cert. denied*, 321 U.S. 769 (1944). (2) Appellant, upon being confronted by Officer Brewington, fled and was found shortly thereafter hiding in some bushes. See *Allen* v. *United States*, 164 U.S. 492, 498-99 (1896); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 3-4, 316 F.2d 652, 654-55 (1963); *Edmonds* v. *United States*, 106 U.S. App. D.C. 373, 379-80, 273 F.2d 108, 114-15 (1959). (3) Appellant was one of the two fleeing robbers Mrs. Steele had pointed out immediately after being robbed. Officer Brewington chased these two robbers and caught and arrested one, the appellant.[12] Certainly, on the basis of this evidence

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[11] Appellant's defense was sheer fiction.

[12] Shortly after his arrest appellant was placed in a lineup which was viewed by Mrs. Steele (Tr. 27, 33). Mrs. Steele was unable to identify appellant; however, she did identify someone else in the lineup who apparently was a police officer (Tr. 28, 33-34). Appellant argues *ad nauseam* that this proves he was not one of the robbers. See Brief for Appellant, pp. 13, 15, 16, 18, 26, 27, 31. Of course, it proves nothing of the kind. Mrs. Steele was quite explicit at trial that she did not have a good look at Robber No. 2; she testified that she only "got a slight glimpse" of him because "he had his head down" (Tr. 21, 26). Furthermore, Mrs. Steele was in the back room with Robber No. 1 while Robber No. 2 was in the front room stealing her property (Tr. 21). Mrs. Steele did have a good look at Robber No. 1. She observed Robber No. 1 when he entered the shop and conversed with her and when he had her confined in the back room (Tr. 20-21). Thus, it is obvious that Mrs. Steele when she viewed the lineup was trying to pick out Robber No. 1 not Robber No. 2 who she concedes she could not identify. Thus, the lineup corroborates Mrs. Steele's in court testimony that she did not have a good look at Robber No. 2 and was unable to identify him.

Appellant has misrepresented to this Court that Mrs. Steele identified someone other than appellant as Robber No. 2. For ex-

reasonable jurors could find appellant guilty of robbery beyond a reasonable doubt.

Appellant makes the corollary contention that since the evidence is insufficient to show that he was involved in the robbery, it is also insufficient to show that he aided and abetted another in the commission of a robbery. The Government relies on the persuasive facts outlined above to support the proposition that appellant was Robber No. 2. Of course, it is possible on the facts of this case that the jury might have felt that appellant, although he stole the property, did not do so "by force and violence and against resistance and by putting in fear." However, even if this occurred, the jury certainly could have found that appellant actively participated in the robbery and aided and abetted Robber No. 1 who clearly used force and fear. See *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Davis* v. *United States*, 124 U.S. App. D.C. 134, 362 F.2d 964, *cert. denied*, 386 U.S. 965 (1966); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 402-03, 303 F.2d 411, 413-14, *cert. denied*, 370 U.S. 946 (1962); *Allen* v. *United States*, 103 U.S. App. D.C. 184, 257 F.2d 188 (1958).[13]

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ample, appellant states: (1) "Thus, testimony of the sole eyewitness strongly suggests that *someone else*, rather than defendant, was the No. 2 man in the robbery." See Brief for Appellant, p. 13. (2) "But the victim identified someone else as Robber No. 2." See Brief for Appellant, p. 18. (3) "As the record shows, Mrs. Steele, although she identified someone else as Robber No. 2, . . ." See Brief for Appellant, p. 26. There is nothing in the record to show that Mrs. Steele when she viewed the lineup identified someone else as *Robber No. 2*. Obviously, when Mrs. Steele viewed the lineup, she was trying to identify Robber No. 1 who she had a good look at and not Robber No. 2 who she really did not see.

[13] Appellant also attacks the sufficiency of the evidence in his allegations that the prosecutor improperly characterized the facts to the jury in closing argument. The sufficiency of the Government's evidence is in part based on the many reasonable inferences that can be drawn from the testimony. The prosecutor did nothing more in his closing argument than point out the testimony and the *reasonable inferences* that can be drawn thereform. The prosecutor argued to the jury the same facts and inferences that the Govern-

II. Appellant was not denied his right to cross-examine the complainant on relevant matters.

(Tr. 27, 28, 29, 31-33)

Appellant contends that he was prevented by the trial court from cross-examining Mrs. Steele as to a conversation she had with Detective Rhone at the police station after she was unable to identify appellant in a lineup.[14]

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ment now urges upon this Court in its sufficiency of the evidence argument.

Appellant's experienced and diligent trial counsel did not object to the prosecutor's closing argument. Being understandably reluctant to censure the conduct of a trial that satisfied trial counsel who was in the arena and in the best possible position to evaluate the impact of the prosecutor's closing argument, appellate courts ordinarily refuse to entertain challenges to the propriety of a summation raised for the first time on appeal. *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961). *Compare Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965) (no objection to prosecutor's argument; conviction affirmed) *with Corley* v. *United States*, 124 U.S. App. D.C. 351, 365 F. 2d 884 (1966) (objection to prosecutor's argument; conviction reversed). As the Supreme Court, speaking through Justice Douglas, succintly held: "(C)ounsel for the defense cannot as a rule remain silent, interpose no objections, and after the verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940). In the instant case, appellant did not object to the Government's closing summation, and since no exceptional circumstances amounting to a denial of a fair trial are present, the propriety of the prosecutor's summation should not be grounds for reversal.

In any event, where as here the evidence is strong and there is no showing of prejudice by appellant, the prosecutor's closing argument will not be grounds for reversal. *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). Compare *King* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 383 (1967); *Corley* v. *United States*, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966).

[14] See Brief for Appellant, pp. 25-27.

Appellant hints that Detective Rhone made improper suggestions to Mrs. Steele concerning the clothing the robbers had worn. See Brief for Appellant, p. 26. Appellant's hint is without any foundation in the record, and although it deserves no reply, the Government will answer it briefly. Mrs. Steele testified that during her conversations with the police "They didn't suggest anything to me" (Tr. 29).

First, appellant did cross-examine Mrs. Steele concerning this conversation and she unequivocally stated that during this conversation the police did not suggest anything to her; they merely asked her what had taken place during the robbery (Tr. 29). Second, appellant, after realizing that he had misunderstood the testimony, voluntarily abandoned his efforts to continue to cross-examine Mrs. Steele concerning her conversation with Detective Rhone.[15]

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[15] During cross-examination of Mrs. Steele, the following took place:

[BY DEFENSE COUNSEL]:

Q I see. Now, 20 minutes later you went to the police station, you said?
A Approximately 20 minutes to a half-hour.
Q What did you do there?
A They questioned me down there and they took me in a room where they had some men standing to see if I could identify any of them, which I did not.
Q You could not identify any of the men standing in this lineup?
A No.
Q Isn't it a fact that you did in fact identify one?
A Yes, but the one that I identified was not the right man.
Q He was the wrong man, was he not? He was a police officer?
A I don't know who he was.?

* * * *

Q Yes, ma'am, what happened next?
A Nothing happened excepting that I was sent to the hospital.
Q Well, isn't it a fact that you had another conversation with the police officers at that time before you went to the hospital?
A Yes, they were talking to me as to what happened.
Q And didn't someone tell you that you picked out the wrong man?
A Yes, they said I had identified the wrong man.
Q And did they not suggest to you that Mr. Brooks was the man you should have identified?
A No.
Q What did they suggest to you?
A They didn't suggest anything to me. They only asked

[Footnote continued on page 14]

[15] [Continued]

me what happened, and about the person whom I identified.

* * * *

Q No. When you left the identification room, you had a conversation with the police officers, I believe?

A Yes, in the next room.

Q In the next room?

A Yes.

Q Can you tell us who was with you?

A Detective Rhone.

Q I'm sorry?

A Detective Rhone.

Q Detective Rhone.

A Was there and several other policemen. I don't know them by name.

* * * *

Q Now, can you tell us your conversation with Detective Rhone?

[PROSECUTOR]: I object, your Honor. That is all irrelevant. She hasn't identified the man.

THE COURT: Objection sustained.

[DEFENSE COUNSEL]: May we approach the bench. I am not sure I understand the ruling. I want to be sure how far I can go.

THE COURT: Yes, you may approach the bench.

AT THE BENCH

[DEFENSE COUNSEL]: If it please the Court, as I understand, I am precluded from going into the conversation she had with Detective Rhone?

THE COURT: What is the materiality of any conversation she had with Detective Rhone?

[DEFENSE COUNSEL]: Well, the point is identification.

THE COURT: She hasn't identified him. You have got it on cross-examination that the man she picked out was the wrong man, and she hasn't made an identification of this defendant yet.

[PROSECUTOR]: That is why I am surprised you even cross-examined her.

[DEFENSE COUNSEL]: *I understood she pointed out Brooks as the man she thought was the No. 2 man.*

THE COURT: When?

[DEFENSE COUNSEL]: *As long as the record is clear.*

THE COURT: Counsel, you can examine her on that point, but this woman has said, to the Court's recollection, that she can't identify Brooks or anybody else in this case.

[Footnote continued on page 15]

Third, appellant contends that his purpose in cross-examining Mrs. Steele about her conversations with Detective Rhone was to uncover factors which may have influenced Mrs. Steele in describing Robber No. 2's clothing.[16] The record is clear, however, that appellant's inquiry into Mrs. Steele's conversation with Detective Rhone was to determine why she had subsequently identified him after previously failing to identify him. Of course this was a misunderstanding on the part of appellant; Mrs. Steele had never identified appellant Brooks. Thus, the trial court did not prevent appellant from pursuing proper cross-examination.

III. The trial court's instructions to the jury were proper.

(Tr. 17, 20-21, 22, 23-25, 37-39, 40-43, 47-48, 130-31, 135, 139-40, 142)

Appellant has made two complaints against the trial court's instructions.[17] First, appellant contends that the

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[15] [Continued]

[DEFENSE COUNSEL]: *Fine.*
[PROSECUTOR]: That's right.
THE COURT: I want counsel to make it perfectly clear. You can do it on redirect if you want to or you can do it on cross-examination.
[DEFENSE COUNSEL]: No. *Your Honor, I misunderstood the testimony then.*
THE COURT: You certainly did.

IN OPEN COURT

THE COURT: I am going to ask a question at this point, counsel.
When you saw this lineup, was this defendant in the lineup?
THE WITNESS: Yes.
THE COURT: He was in the lineup?
THE WITNESS: Yes, he was there.
THE COURT: Did you pick him out of that lineup?
THE WITNESS: No, I didn't. (Tr. 27-34.) (Emphasis added.)

[16] See Brief for Appellant, p. 26.

[17] See Brief for Appellant, pp. 20-25.

aiding and abetting instruction should not have been given under the circumstances of this case. This contention was raised in the trial court.[18] Second, appellant contends that the trial court's instructions on burden of proof, aiding and abetting and robbery were so "contradictory" and "hopelessly confused" that the jury could not have understood them. This contention was *not* raised in the trial court. Appellant's trial counsel who fought vigorously during the trial for appellant did not believe that the jury would be confused by the court's instructions and therefore did not interpose an objection or request clarification. Thus, there being no objection raised below, this Court should not review appellant's second contention concerning the instructions. FED. R. CR. P. 30; *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744,

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[18] After the trial court gave the instructions, the following took place:

> THE COURT: Any objections to the charge?
> [PROSECUTOR]: We have nothing, your Honor.
> [DEFENSE COUNSEL]: May we approach the bench, if the Court please.
> THE COURT: Yes.
>
> AT THE BENCH
>
> [DEFENSE COUNSEL]: For the record, may I note an exception to the inference of guilt instruction on the special government instruction No. 1, the aiding and abetting instruction.
> THE COURT: All right. Your objection is noted for the record.
> [PROSECUTOR]: May I inquire, is that just a general objection to the instruction itself?
> THE COURT: Yes. He objects to the giving under the circumstances in this case.
> [PROSECUTOR]: Just generally?
> [DEFENSE COUNSEL]: Yes. (Tr. 142.)

Note: This was the only objection made by appellant to the trial court's instructions.

cert. denied, 375 U.S. 898 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

Appellant's first contention that an aiding and abetting instruction should not have been given under the circumstances of this case is without merit. The Government proved that Robber No. 1 entered Mrs. Steele's dry cleaning shop and *forced* her in the back room; Robber No. 2 (appellant) then entered the shop and asked Mrs. Steele where her pocketbook was (Tr. 17, 20-21). While Robber No. 1 held Mrs. Steele in the back room, appellant stole from the front room Mrs. Steele's billfold and money from the cash register, and then said to Robber No. 1, "All right, let's go" (Tr. 20-21, 23-25). Appellant and Robber No. 1 fled the shop and were chased by a police officer, Officer Brewington (Tr. 22, 37). Within five minutes Officer Brewington arrested appellant who was hiding in some bushes on the Raymond School playground (Tr. 37-39, 47-48). A search of appellant's person revealed Mrs. Steele's billfold, and a large quantity of change and paper currency which approximated the amount stolen from Mrs. Steele (Tr. 23-25, 40-43). On these facts, there is no doubt that appellant was actively participating in the robbery. However, it is possible on these facts that the jury might not be convinced beyond a reasonable doubt that appellant *personally* used force or fear to steal the property. It is for this reason that the jury was instructed on aiding and abetting and under the facts of this case, such an instruction was proper. See 22 D.C. CODE § 105 (1961); *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949); *Davis* v. *United States*, 124 U.S. App. D.C. 134, 362 F.2d 964, *cert. denied*, 386 U.S. 965 (1966); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 402-03, 303 F.2d 411, 413-14, *cert. denied*, 370 U.S. 946 (1962); *Allen* v. *United States*, 103 U.S. App. D.C. 184, 257 F.2d 188 (1958).

Appellant's second contention is that the instructions on burden of proof, robbery and aiding and abetting were so "contradictory" and "hopelessly confused" that the jury could not have understood them. Appellant, by tak-

ing and comparing a few sentences out-of-context, has asked this Court to find such confusion and plain error in the instructions as a whole as to require a reversal. This request is made without regard to the fact that appellant's diligent trial counsel did not find the court's instructions contradictory or confused. The Government is confident that this Court will be satisfied that the instructions read as a whole are explicit, and therefore, the Government has set out below the important instructions.[19] From these instructions it is clear that the jury could convict appellant if they found that he either personally committed each of the elements of robbery or that

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[19] The Court's instructions on burden of proof, robbery and aiding and abetting were almost identical to those in Criminal Jury Instructions for the District of Columbia, Nos. 8 & 9 (burden of proof), 104 (robbery), and 47 (aiding and abetting), published by The Bar Association of the District of Columbia (1966).

(A) Burden of Proof

Now, every defendant in a criminal trial is presumed to be innocent. *This presumption of innocence remains with the defendant throughout the course of the trial unless and until he is proven guilty beyond a reasonable doubt.*

The burden is on the Government of the United States to prove the defendant guilty beyond a reasonable doubt. And this burden of proof never shifts throughout the course of the trial. The law does not require a defendant to prove himself innocent, nor require a defendant to give any evidence. And unless the Government proves beyond a reasonable doubt that this defendant has committed each element of the offense with which he is charged, you must find him not guilty.

Now, what is reasonable doubt? It is, as the name implies, a doubt based on reason, a doubt for which you can give a reason. It is the kind of a doubt that would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver and more weightier affairs in his own life.

However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. Now, the Government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. *Its*

[Footnote continued on page 19]

[19] [Continued]

burden is to establish guilt beyond a reasonable doubt. (Tr. 130-31.) (Emphasis added.)

(B) Robbery

Now, the essential elements of the offense of robbery, each of which the Government must prove beyond a reasonable doubt, are:

(1) That the defendant took property of some value from the complainant against the will of the complainant, Mrs. Steele; and

(2) That the defendant took possession of such property by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting the complainant in fear; and

(3) That the defendant took possession of such property from the person or immediate actual possession of the complainant; and

(4) That, after having so taken the property, the defendant carried it away; and

(5) That the defendant took such property and carried it away without right to do so and with specific intent to steal it. (Tr. 135.)

[The court then went on to explain each element in detail.]

(C) Aiding and Abetting

Now, in considering whether or not the defendant is guilty of robbery, it is not necessary that he has committed each of the acts or elements which constitute the crime. *If you find from the evidence that Marion Brooks either aided or abetted another unknown principal offender in the commission of the offense, or himself committed each of the acts constituting robbery, then you may find him guilty as charged. In so determining guilt under the theory of aiding and abetting, it is not necessary that the defendant personally have committed each of the acts constituting the offense or that he was personally present at the commission of the offense.* Any person who advises, incites, or connives at an offense, or aids or abets the principal offender, is punishable as a principal. That is, he is as guilty of the offense as if he had personally committed each of the acts constituting the offense.

Now, a person aids or abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture, with the intent to commit the crime, participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed.

Now, some conduct on the part of the defendant of an affirmative character in the furtherance of a common criminal design or purpose is necessary, and the mere physical presence of the defendant at the time and the place of the commission of an offense is not in and of itself sufficient to establish his guilt. But it is not necessary that any specific time or mode of committing the offense shall have

[Footnote continued on page 20]

he aided and abetted an unknown principal in which case it would not be necessary for appellant to have personally committed each of the elements of robbery.

Appellant also suggests that the jury was not instructed on the quantum of proof needed to convict him as an aider and abetter. The trial court instructed the jury in no uncertain terms, as follows:

> *The burden is on the Government of the United States to prove the defendant guilty beyond a reasonable doubt. And this burden never shifts throughout the course of the trial.* (Tr. 130.) (Emphasis added.)

The trial court then went on in detail to explain what was meant by reasonable doubt (Tr. 130-31).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
CARL S. RAUH,
Assistant United States Attorneys.

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[19] [Continued]

been advised or commanded, or that it shall have been committed in the particular way instigated or agreed upon. Nor is it necessary that there shall have been any direct communication between the actual perpetrator and the defendant, if you find him to be an aider and abettor. (Tr. 139-40.) (Emphasis added.)

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